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5 UNITED STATES DISTRICT COURT  
6 DISTRICT OF NEVADA

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8 MICHAEL L. SERWE,

9 Plaintiff,

10 v.

11 WAL-MART STORES, INC., a Delaware  
Foreign Corporation, *et. al.*,

12 Defendants.

Case No. 2:16-cv-00017-MMD-NJK

ORDER

(Re: Def's Motion to Exclude —  
ECF No. 29)

13 **I. SUMMARY**

14 Before the Court is Defendant Wal-Mart Stores, Inc.'s ("Walmart") Motion to  
15 Exclude Testimony from Plaintiff's Treating Physicians and Evidence of Plaintiff's Medical  
16 Billing Pursuant to FRCP 37 ("Motion"). (ECF No. 29.) Plaintiff Michael Serwe ("Serwe")  
17 filed a response (ECF No. 32); and Walmart has replied (ECF No. 33.) For the reasons  
18 discussed, below the Motion is denied

19 **II. BACKGROUND**

20 Serwe alleges that on June 3, 2014, he was riding his bicycle across Walmart's  
21 parking lot when he crashed and injured himself. (ECF No. 1-2 at 3.) Serwe appears to  
22 assert a single claim for negligence. (ECF No. 1-2.)

23 There is no dispute that Plaintiff has not disclosed any expert witness in this case.  
24 In Plaintiff's disclosures dated April 22, 2016, Plaintiff identified among witnesses his  
25 treating physician, Kirk Mendez, M.D., and the "Custodian of Records" for Mountain View  
26 Hospital ("the Hospital"), and disclosed billing records from the Hospital. (ECF No. 29-6 at  
27 3-5.) Plaintiff's disclosures state that Dr. Mendez is "expected to testify regarding the facts  
28 and circumstances surrounding the incident on June 3, 2014." (*Id.* at 3.)

1     **III.     DISCUSSION**

2             Walmart argues that Dr. Mendez should be excluded from testifying as an expert  
3     witness because Plaintiff fails to disclose him as an expert.<sup>1</sup> (ECF No. 29 at 10.) Plaintiff  
4     counters that Dr. Mendez is expected to testify as to his treatment of Plaintiff, and not as  
5     a retained expert. (ECF No. 32 at 4-5.)

6             Treating physicians may testify as to “opinions that were formed during the course  
7     of treatment” without providing a written report. Fed. R. Civ. P. 26(a)(2)(B); *see Goodman*  
8     *v. Staples The Office Superstore, LLC*, 644 F.3d 817 (9th Cir. 2011) (holding that a treating  
9     physician is exempt from Rule 26(a)(2)’s requirement to provide a written report, but when  
10    a treating physician morphs into a witness hired to render expert opinions that go beyond  
11    the usual scope of a treating doctor’s testimony, the proponent of the testimony must  
12    comply with Rule 26(a)(2)). Walmart seems to suggest that causation cannot fall within  
13    opinions formed during the course of treatment. However, a treating physician may have  
14    to determine the cause of injuries as part of the treatment. Thus, to the extent Dr. Mendez  
15    determined the cause of Plaintiff’s injuries as part of the course and scope of his treatment,  
16    then Dr. Mendez may testify as to this matter. Dr. Mendez, however, may not render expert  
17    opinions that exceed the scope of his treatment of Plaintiff.

18    **IV.     CONCLUSION**

19             The Court notes that the parties made several arguments and cited to several cases  
20    not discussed above. The Court has reviewed these arguments and cases and determines  
21    that they do not warrant discussion as they do not affect the outcome of Walmart’s Motion.

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26             <sup>1</sup>Walmart also argues that evidence of the medical billings should be excluded  
27    absent testimony from an expert witness as to the reasonableness of the bills. (ECF No.  
28    29 at 19-20.) However, it is not clear to the Court that Dr. Mendez cannot testify as to the  
   reasonableness of the medical bills as part of his treatment of Plaintiff.

1 It is therefore ordered that Defendant's Motion Exclude Testimony from Plaintiff's  
2 Treating Physicians and Evidence of Plaintiff's Medical Billing Pursuant to FRCP 37 (ECF  
3 No. 29) is denied.

4 DATED THIS 7<sup>th</sup> day of March 2018.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE